No. 84-1615

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In The

Supreme Court of the United States

October Term, 1984

BOROUGH OF DEMAREST, ELIAS M. ELIASOF, EUGENE BARDEN, and EDWARD W. JANSEN,

Petitioners,

vs.

TOWNSHIP OF MAHWAH, JOANNE MAKELY, FRANK P. KRAUS, NEILAN BOMAN, and BERGEN COUNTY BOARD OF TAXATION,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case involves a challenge by a municipal corporation, the Borough of Demarest, and several individuals contesting the validity of a statute of the State of New Jersey. The subject statute N.J.S.A. 54:4-5 was adopted in and has been in operation since the year 1922.

Petitioner argues that the subject statute is a taxation statute which violates the principle of equal protection. In fact the subject statute is not a taxation statute. The subject statute provides financial assistance to certain municipalities in the most heavily populated counties of the state to enable them to provide support services to large county and state facilities located within the municipality and to compensate the municipality for the loss of taxable ratables.

The subject statute was challenged as being in violation of the special legislation provision of the New Jersey Constitution. N.J. Constitution Article IV, section 7, par. 9. (1947). The petitioner did not actively assert that the statute also violated the United States Constitution. Although the petitioner Demarest raises the issue of a violation of the Equal Protection Clause of the United States Constitution in its petition, the challenge below was essentially addressed to the provisions of the New Jersey Constitution. The absence of references to the federal issues in the three state court decisions is not an oversight. The only reference to a constitutional issue in petitioners' appendix is a reference to one line of the pretrial order line 16(b) "Constitutionality of N.J.S.A. 54:4-5". There is no reference to the Federal Constitution. Nor is there any reference to the Federal Constitution in any of the attachments to the pretrial order which were submitted by the parties.

On pages 6 and 7 of the petition, petitioner argues that there should not be a factual distinction between the respondent Township of Mahwah in Bergen County and other similarly situated municipalities in other counties. This factual argument should be rejected for two reasons. First, the mere allegation of state ownership is not sufficient to satisfy the requirements of the subject statute. The document relied upon by petitioner merely demonstrates state ownership. At the lengthy trial of the case the respondent proved "actual governmental use" of th ubject

properties. There was no proof whatsoever that there was "actual governmental use" of the acreage in other municipalities referred to by respondent in its statement of the case. At the trial below, petitioner argued that the respondent was required to prove ownership and actual use so as to satisfy the "occupancy" requirement of the challenged statute. A reference on appeal to total ownership of acreage located elsewhere without proof of actual usage does not prove that the other municipalities are similar.

Secondly, it should be noted that the document referred to by petitioner and reproduced in its appendix was not admitted into evidence. The documents identified as a compilation of state owned property were not admitted into evidence. *See* Petitioner's Appendix p. 155a. All references to acreage in other municipalities should therefore be disregarded for the two reasons set forth above.

ARGUMENT

The subject statute, N.J.S.A. 54:4-5 is not a taxation statute. The statute provides a mechanism by which a municipality receives financial assistance when tax exempt state and county institutions are located in the most populated counties. The financial assistance offsets the demonstrated actual costs of services rendered to the institution as well as intangible costs including reduced property values and depreciation of municipal infrastructure. The statute also provided financial relief for loss of taxable properties. The rationale of the statute is not limited to reimbursement of actual costs.

The monies which are partially rebated to the municipality under the statute were collected neither as a tax on an individual nor as a tax on property. The monies are collected from a variety of sources. The redistribution of these monies is merely an apportionment of the costs of county government among the

municipalities comprising the county. *See Meadowlands Regional Dev. Agency v. State*, 63 N.J. 35 at 46 (1973), *cert. denied*, 414 U.S. 991 (1973).

The respondent contends that the petition does not assert any federal issue. However, even if a federal issue were presented, it is not substantial. The subject statute was reviewed by the New Jersey Supreme Court under the "special legislation" provisions of the New Jersey Constitution. The criteria applied by the New Jersey Supreme Court when reviewing legislation challenged under the special legislation prohibition have been equated with the review criteria established for a review of denial of equal protection under the Federal Constitution. *Harvey v. Essex County Board of Freeholders*, 30 N.J. 381 at 394 (1959) and *McKenny v. Byrne*, 82 N.J. 304 at 314-316 (1980).

Since there are no fundamental rights or suspect categories involved in the application of this fiscal statute of distribution, there is no invidious discrimination in the application of this statute. The Court should defer to the legislative classification. There is a rational basis for the legislative classification. Legislative classifications in the area of finance and taxation cannot be perfect and free of all discriminatory impact. The distributive scheme should therefore be supported on any conceivable rational basis. *San Antonio Independence District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L.Ed 2d 16 (1973).

The cases cited by petitioner in its Argument in fact support the respondent's contentions.

In *Regan v. Taxation With Representation*, ____ U.S. ____, 76 L. Ed. 2d 129, 103 S. Ct. ____ (1983), the United States Supreme Court recapitulated the principle that local legislatures have especially broad latitude in creating classifications and distinctions in this area of the law. Only by the most explicit

demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes can the presumption of constitutionality be overcome. The discrimination required to declare local fiscal legislation unconstitutional under the provisions of the United States Constitution or under the New Jersey Constitution has not been shown in this case.

CONCLUSION

For the reasons set forth above, the respondent herein submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

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